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No. 84-1429

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES GILBERT,
Appellant,

vs.

UNIVERSITY OF TENNESSEE, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF TENNESSEE AT JACKSON

MOTION TO DISMISS

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ON APPEAL FROM THE SUPREME COURT
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MOTION TO DISMISS

Appellees move the Court to dismiss the appeal herein on the following grounds:

1. The federal question sought to be reviewed was not timely raised within the period required by law, 28 U.S.C. § 2101(c).

2. Appellant does not present a substantial federal question for review by this Court.

THE STATE STATUTE INVOLVED

The jurisdictional statement fully sets forth the state statutes involved; those need not be repeated here.

RESTATEMENT OF THE QUESTION PRESENTED

Does Tennessee Code Annotated § 4-5-120(a) violate the due process clause of the Fourteenth Amendment to the U. S. Constitution by permitting the appointment by a state agency of a hearing examiner to conduct a hearing of disciplinary charges against a state employee but requiring the final decision to be made by the agency upon its review of the administrative record?

THE PROCEEDINGS BELOW

This action originated under the "contested cases" provision of The Tennessee Uniform Administrative Procedures Act, Tennessee Code Annotated §§ 4-5-108 - 4-5-120 (herein called APA).[1] The basic facts giving rise to the action are undisputed and are well stated by the Tennessee Court of Appeals' decision of January 31, 1983 [Jurisdictional Statement, A3-A8]. Such facts may be summarized as follows:

On May 20, 1981 appellant received a letter advising him that his employment as cashier in the Business Office of The University of Tennessee Center for the Health Sciences would be terminated on the basis of a charge that he purchased and possessed illegal drugs on University premises.

Appellant requested, and was afforded, a hearing pursuant to the provisions of the APA to contest his termination. Pursuant to § 4-5-120(a) of the APA, Dr. James C.

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1. T.C.A. §§ 4-5-109 - 4-5-133 were transferred or repealed by Acts of 1982 (Adj. S.) Ch. 874. T.C.A. § 4-5-120, herein involved, was repealed by § 36 of Acts of 1982, Ch. 874. For new law, see T.C.A. § 4-5-301, et seq.

Hunt, Chancellor of The University of Tennessee Center for the Health Sciences, appointed Dr. Samuel R. Bozeman, a member of Dr. Hunt's staff, to conduct a hearing and present findings to him for his consideration, following which Dr. Hunt would make the final decision.

The hearing was conducted and a transcript of the hearing was prepared. By memorandum of August 3, 1981 Dr. Bozeman forwarded his findings and recommendations to Dr. Hunt [Jurisdictional Statement, A36-A41]. Therein, Dr. Bozeman concluded that the plaintiff was not guilty of the charge against him and that plaintiff should be reinstated to his position.

Thereafter, Dr. Hunt carefully reviewed the record in this matter, including the hearing transcript, and concluded that plaintiff was guilty of the charge against him. Dr. Hunt, in his "Final Order," detailed fully the basis for his decision and disagreement with the hearing examiner [Jurisdictional Statement, A42-A51]. Following such decision, appellant, pursuant to T.C.A. § 4-5-117, filed a timely petition with the Chancery Court of Shelby County, Tennessee seeking judicial review of Dr. Hunt's decision. The administrative record was filed with the Court, and both parties moved for summary judgment on the basis of such record.

The Chancery Court subsequently ruled that T.C.A. § 4-5-120(a), to the extent it requires the agency to enter the final order, violates the substantive and procedural due process rights of appellant. It was the Chancery Court's opinion that appellant's due process rights under the Fourteenth Amendment were violated because the APA vested the final decision-making authority in someone other than the hearing examiner. No authority was cited to support such holding. Appellees appealed the

Chancery Court decision to the Tennessee Court of Appeals, raising a single question as follows:

> Did the Chancery Court err in holding that the provisions of The Uniform Administrative Procedures Act, T.C.A. § 4-5-120(a), which requires the agency, acting through an individual other than the hearing examiner, to enter the final order violate plaintiff's substantive and procedural due process rights under the Fourteenth Amendment?

On January 31, 1983 the Court of Appeals entered judgment for appellees, holding that T.C.A. § 4-5-120(a) was constitutional, and remanding the case to the Chancery Court for review of Dr. Hunt's decision in accordance with the standard of review stated in T.C.A. § 4-5-117 [Jurisdictional Statement, A1-A10].

Appellant subsequently applied to the Tennessee Supreme Court for permission to appeal the Court of Appeals' decision on the constitutional issue. On April 4, 1983 the Tennessee Supreme Court denied plaintiff's application, which was the final judgment of the state court on this issue [Jurisdictional Statement, A11].

The Chancery Court thereafter reviewed the merits of Dr. Hunt's decision according to the standard provided by T.C.A. § 4-5-117, and entered judgment in favor of appellees. Appellant appealed this decision to the Tennessee Court of Appeals on several grounds, including the claimed unconstitutionality of T.C.A. § 4-5-120(a).

On September 26, 1984, the Court of Appeals ruled in appellees' favor on all issues. Appellant's second attack on the constitutionality of T.C.A. § 4-5-120(a) was summarily rejected by the Court of Appeals, which ruled that its previous ruling on the same issue, with application for

permission to appeal to the Tennessee Supreme Court having been denied in April 1983, was *res judicata* [Jurisdictional Statement, A14].

Appellant thereupon applied for permission to appeal this decision to the Tennessee Supreme Court, which, by order of December 10, 1984, denied the application [Jurisdictional Statement, A21].

Appellant now appeals to this Court pursuant to 28 U.S.C. § 1257(2), claiming that T.C.A. § 4-5-120(a) "violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution to the extent said statute permitted a state agency (The University of Tennessee) to appoint a hearing examiner to conduct a hearing of disciplinary charges against a state employee (Gilbert) but requiring the agency to make the final decision based on its review of the entire record of the disciplinary proceedings, where the agency (acting through Dr. Hunt) did not personally observe the witnesses at the hearing."

ARGUMENT

I

The Federal Question Sought to Be Reviewed Was Not Timely Raised Within the Period Required by Law, 28 U.S.C. § 2101(c)

The Tennessee Court of Appeals, in its judgment and opinion of January 31, 1983, specifically addressed the issue of whether "T.C.A. § 4-5-120(a), which requires the agency, acting through an individual other than the hearing examiner, to enter the final order, violated the substantive and procedural due process rights of the plaintiff"

[Jurisdictional Statement, A5]. The Court of Appeals ruled:

> We must therefore hold that T.C.A. § 4-5-120(a) is constitutional and does not violate the plaintiff's substantial [sic] and procedural due process rights in the manner in which it was applied. As a result, we sustain the issue presented for review by the defendant as to this question [Jurisdictional Statement, A9].

The Court of Appeals, however, remanded the case to the Chancery Court only for the purpose of reviewing Dr. Hunt's decision in accordance with the standards of T.C.A. § 4-5-117 [Jurisdictional Statement, A10].

Appellant applied for permission to appeal the judgment of the Court of Appeals to the Tennessee Supreme Court. However, the Tennessee Supreme Court denied Gilbert's application on April 4, 1983, which constituted the final judgment of the state court on this issue [Jurisdictional Statement, A11].

The Chancery Court thereafter reviewed the merits of appellant's case and entered judgment in favor of appellees [Jurisdictional Statement, A33-A35].

Appellant again sought to challenge the constitutionality of T.C.A. § 4-5-120(a) in his appeal of this adverse decision of the Chancery Court. However, the Court of Appeals quickly disposed of this new challenge, saying:

> We dispose of this last issue by simply stating that it was presented to this Court in an earlier appeal of this case and by an opinion filed January 31, 1983, it was decided in favor of the University. Application for permission to appeal in that case was denied in April, 1983. Therefore, our former opinion is *res judicata* as to this issue [Jurisdictional Statement, A14].

Clearly, Gilbert's federal claim was finally adjudicated by the Tennessee state courts on April 4, 1983. In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 478 (1975), this Court noted:

> In the third category [situations in which state courts rule on a federal issue and yet there are further proceedings in the state courts] are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts [p. 481].

In the instant case, it is plain that the 1983 ruling of the Tennessee Supreme Court was final and that appellant was foreclosed from again presenting his constitutional challenge to T.C.A. § 4-5-120(a) to the state courts. Accordingly, the period within which appellant was required to appeal the final decision of the state courts on this federal issue commenced on April 4, 1983.

And, since the notice of appeal to this Court was filed on January 7, 1985, more than twenty-one months after the issue of the constitutionality of T.C.A. § 4-5-120 (a) was finally disposed of by the Tennessee courts, appellant's appeal is untimely.

II

Appellant Does Not Present a Substantial Federal Question for Review by This Court

It is noteworthy that appellant cites not a single case in support of his position, and we are unaware of any decision by this Court which holds that due process requires the final decision-maker to hear and see the witnesses. Such a rule would negate the "clearly erroneous rule" applicable to review of factual matters by federal courts of appeals and references by trial courts to magistrates and special masters.

Indeed, the issue raised by plaintiff has been well settled by this Court. In *United States v. Raddatz,* 447 U.S. 667 (1980), this Court expressly considered the ruling of the Court of Appeals for the Seventh Circuit that the due process provisions of the Fifth and Fourteenth Amendments require the decision-maker "personally to hear the controverted testimony [where credibility is crucial to the outcome]," *Id.,* at 672. This Court rejected and reversed the Court of Appeals' ruling, saying:

> Generally, the ultimate fact-finder in administrative proceedings is a commission or board, and such trier has not heard the witnesses testify [citation omitted]. While the commission or board—or an administrator —may defer to the findings of the hearing officer, that is not compelled. See, e.g. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *NLRB v. Mackay Radio & Tel. Co.,* 304 U.S. 333, 350-351, 58 S.Ct. 904, 912-913, 82 L.Ed. 1381 (1938); *Morgan v. United States,* 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); *Utica Mutual Insurance Co. v. Vincent,* 375 F.2d 129, 132 (Ca. 2)

(Friendly, J.) cert. denied, 389 U.S. 839, 88 S.Ct. 63, 19 L.Ed.2d 102 (1967) [*Id.*, 447 U.S. at p. 680].

The final decision-maker has "broad discretion to accept, reject or modify [the fact-finder's] findings." *Id.*, p. 680.

Similarly, this Court recently confirmed that the Constitution not only permits, but may require, a decision-maker to decide a case independent of the recommendations of a fact-finder. *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). There, the Court made specific reference to the 1978 Federal Magistrate's Act (where the "magistrate's proposed findings and recommendations were subject to de novo review by the District Court, which was free to rehear the evidence or to call for additional evidence."), the pre-1973 bankruptcy rules (where "the district judge, after hearing the report of the magistrate, was free to 'modify it or . . . reject it in whole or in part . . . receive further evidence or . . . recommit it with instructions' "), and federal legislation establishing the United States Employees Compensation Commission (where the federal district court "had the sole power to enforce [a Commission order] or set it aside, depending upon whether the Court determined it to be 'in accordance with the law' and supported by evidence in the record."), *Northern Pipeline*, 458 U.S. pp. 78-79. See also *Federal Trade Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Universal Camera Corp. v. National Labor Rel. Bd.*, 340 U.S. 474, 496-497 (1951).

Appellant cites no authority whatever in contradiction to the rulings of this Court on the issue here presented.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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